(Marshall, J., dissenting). Rather, the *Biggers* Court intimated that "the factors to be considered in evaluating the likelihood of misidentification" were drawn from the common law, "as indicated by [the Court's] cases." 409 U.S. at 199. Without citing any specific legal precedents or scientific basis, the *Biggers* Court simply announced five external indicia that it perceived to be analytically effective in measuring the reliability of eyewitness testimony.[2]

Indeed, a witness's level of certainty was considered a questionable indicator of accuracy even prior to *Biggers*. *See, e.g.*, *Clemons v. United States*, 408 F.2d 1230, 1242 (D.C. Cir. 1968) ("although the positiveness of the witness . . . is a relevant factor, it is to be weighed warily and in the realization that the most assertive witness is not invariably the most reliable one"). As Justice Marshall pointed out, "the witness' degree of certainty in making the identification [] is worthless as an indicator that he is correct." *See Brathwaite*, 432 U.S. at 130 (Marshall, J., dissenting) (citing PATRICK WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 15-16 (1965); *People v. Anderson*, 205 N.W.2d 461, 493-494 (Mich. 1973); Frank O'Connor, *"That's the Man": A Sobering Study of Eyewitness Identification and the Polygraph*, 49 ST. JOHN'S L. REV. 1, 4-6 (1974)).

Although other *Biggers* factors had some antecedents in the Court's earlier opinions or the common law, eyewitness certainty had virtually no role as a meaningful indicator of reliability in the Court's jurisprudence prior to *Biggers*.[3]

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[2] Indeed, because this Court cited no scientific evidence supporting its assumption that these factors effectively predict eyewitness accuracy, researchers have noted that this Court merely "offered an intuitive theory of eyewitness identification or at least a set of five hypotheses." Gary L. Wells & Donna M. Murray, *What Can Psychology Say About the* Neil v. Biggers *Criteria for Judging Eyewitness Accuracy?*, 68 J. APPLIED PSYCHOL. 347, 348 (1983) [hereinafter *What Can Psychology Say*].

[3] Before *Biggers*, the fact that eyewitnesses expressed a high level of certainty had no independent effect on the Court's due process analysis. *See, e.g.*, *Simmons*, 390 U.S. at 385; *Foster*, 394 U.S. at 441-42.

Rather, the Court appears to have adopted the certainty factor based solely on its intuitive (albeit unfounded) appeal, rather than on any scientific principle or empirical fact. *See State v. Long*, 721 P.2d 483, 491 (Utah 1986) (the *Biggers* test was "based on assumptions that are flatly contradicted by well-respected and essentially unchallenged empirical studies."); *accord Brodes v. State*, 614 S.E.2d 766, 770 (Ga. 2005). The Court should now resolve the long-standing disconnect between law and science and establish an empirically sound approach to the reliability of eyewitness identifications.

B. Courts and Legal Scholars Have Condemned *Biggers* as an Unsound Analysis of Eyewitness Accuracy and Have Accordingly Sought to Develop Judicial Remedies to Safeguard Due Process

For twenty years, courts have considered academic and scientific literature in questioning the continued soundness of the *Biggers* reliability analysis.[4] Legal commentators have also extensively reviewed empirical research and scientific

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[4] *See, e.g., State v. Ledbetter*, 881 A.2d 290, 312 (Conn. 2005) ("it is appropriate for this court to survey relevant scientific data as that data has been reported in the decisions of other courts and in the scientific literature"); *Brodes v. State*, 614 S.E.2d 766, 770 (Ga. 2005) ("The scientific validity of the studies confirming the many weaknesses of eyewitness identification cannot be seriously questioned at this point.") (internal quotation marks and citation omitted); *Commonwealth v. Johnson*, 650 N.E.2d 1257, 1262 (Mass. 1995) ("[S]tudies conducted by psychologists and legal researchers since *Brathwaite* have confirmed that eyewitness testimony is often hopelessly unreliable."); *State v. Ramirez*, 817 P.2d 774, 780 (Utah 1991) ("[W]e do not agree entirely with the *Biggers* listing of the relevant criteria for determining the reliability of eyewitness identifications and . . . we find some of those criteria to be scientifically unsound."); *State v. Long*, 721 P.2d 483, 488 (Utah 1986) (concluding that "[t]he literature is replete with empirical studies documenting the unreliability of eyewitness identification."); *State v. Dubose*, 699 N.W.2d 582, 592 (Wisc. 2005) ("In light of [empirical] evidence, we recognize that our current approach to eyewitness identification has significant flaws.").

data demonstrating that the *Biggers* test—and particularly the certainty factor—is not a valid predictor of the reliability of eyewitness testimony.[5] Notably, very little scientific data supports the *Biggers* test as a dependable metric for evaluating eyewitness testimony. Courts and practitioners should therefore not be bound by the unsupported assumptions embodied in the *Biggers* factors.

1. Based on Existing Empirical Data, State Courts Have Sought to Eliminate the Certainty Factor from the Analysis

Several state courts of last resort have expressly relied upon empirical research to remedy due process concerns stemming from defects in the *Biggers* test. *See, e.g.*, *Dubose*, 699 N.W.2d at 596 ("Based on our reading of [the due process] clause . . . the approach outlined in *Biggers* and *Brathwaite* does not satisfy this requirement."); *Johnson*, 650 N.E.2d at 1261 ("[W]e conclude that we cannot accept *Brathwaite* as satisfying the requirements of [due process under the Massachusetts constitution].").

State courts have pointedly criticized the certainty factor. In finding the *Biggers* analysis "scientifically unsupported" and fashioning a "more empirically based approach," the Utah Supreme Court rejected the certainty factor as an indicator of an identification's reliability. *Ramirez*, 817 P.2d at 780-81; *see also Long*, 721 P.2d at 490 ("Research has also undermined the common notion that the confidence with which an individual makes an identification is a valid

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[5] *See, e.g.*, Donald P. Judges, *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement*, 53 ARK. L. REV. 231, 250 (2000); Connie Mayer, *Due Process Challenges to Eyewitness Identification Based on Pretrial Photographic Arrays*, 13 PACE L. REV. 815, 844 (1994); Benjamin E. Rosenberg, *Rethinking the Right to Due Process in Connection With Pretrial Identification Procedures: An Analysis and a Proposal*, 79 KY. L.J. 259, 276 (1991); Randolph N. Jonakait, *Reliable Identification: Could the Supreme Court Tell in* Manson v. Brathwaite*?*, 52 U. COLO. L. REV. 511 (1981).

indicator of the accuracy of the recollection."). Citing the "uncontradicted" scientific literature, the Connecticut Supreme Court found that "the fourth *Biggers* factor is particularly flawed because a weak correlation, at most, exists between the level of certainty demonstrated by the witness at the identification and the accuracy of that identification." *Ledbetter*, 881 A.2d at 311. And the Supreme Judicial Court of Massachusetts expressed "significant doubt about whether there is any correlation between a witness's confidence in her identification and the accuracy of her recollection[,]" and held that trial courts should not instruct a jury to "take into account . . . the strength of the identification." *Commonwealth v. Santoli*, 680 N.E.2d 1116, 1121 (Mass. 1997).

Most recently, the Georgia Supreme Court recognized that "'[a]n important body of psychological research undermines the lay intuition that confident memories of salient experiences . . . are accurate.'" *Brodes*, 614 S.E.2d at 770 (quoting *Kirk v. Eli Lilly & Co.*, 897 F.2d 293, 296 (7th Cir. 1990)). The court held that it could "no longer endorse an instruction authorizing jurors to consider the witness's certainty in his/her identification as a factor to be used in deciding the reliability of that identification[,]" and instructed Georgia trial courts to "refrain from informing jurors they may consider a witness's level of certainty when instructing them on the factors that may be considered in deciding the reliability of that identification." *Brodes*, 614 S.E.2d at 771. The court found this approach necessary "[i]n light of the scientifically-documented lack of correlation between a witness's certainty in his or her identification of someone as the perpetrator of a crime and the accuracy of that identification[.]" *Id.*[6]

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[6] This Court too has previously relied upon sociological and scientific research in evaluating constitutional challenges, including those relating to the inherently suspect qualities of eyewitness identification evidence. *See, e.g.*, *Wade*, 388 U.S. at 228 n.6; *Watkins v. Sowders*, 449 U.S. 341, 350 n.1 (1981) (Brennan, J., dissenting, with Marshall, J.) ("The special

2. Courts Have Also Used Cautionary Instructions in an Effort to Mitigate the Risk of Mistaken Eyewitness Testimony Admitted Under *Biggers*

Moreover, some state courts have recognized that even the most well-intentioned juries may fail to accurately evaluate eyewitness identification evidence once it has been deemed admissible under *Biggers*. "Although research has convincingly demonstrated the weaknesses inherent in eyewitness identification, jurors are, for the most part, unaware of these problems. People simply do not accurately understand the deleterious effects that certain variables can have on the accuracy of the memory processes of an honest eyewitness." *Ramirez*, 817 P.2d at 779-80 (quoting *Long*, 721 P.2d at 490 (citations omitted)). *See also Jones v. State*, 749 N.E.2d 575, 586 (Ind. Ct. App. 2001) ("[W]e are not thoroughly convinced that the average juror is conversant with the likelihood or frequency with which misidentifications are made by seemingly unequivocal witnesses.") (internal quotation marks omitted).

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nature of eyewitness identification evidence has produced an enormous reservoir of scholarly writings, many based on solid empirical research."). *See also Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 1195-96 (2005) (considering research on adolescent behavior in concluding it was unconstitutional to impose capital punishment for crimes committed while the defendant was a minor); *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (relying on "expert studies and reports . . . show[ing] that student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society" in concluding that a race-conscious law school admission policy passed constitutional muster) (internal quotation marks and citations omitted); *id.* at 364-65 (Rehnquist, C.J., dissenting, with Scalia, Kennedy, Thomas, J.J.) (relying on social science evidence to support a contrary conclusion); *Atkins v. Virginia*, 536 U.S. 304, 318 nn.23-24 (2002) (relying on sociological and scientific evidence in concluding that execution of the mentally retarded constituted "cruel and unusual punishment" in violation of the Eighth Amendment); *Davis v. United States*, 512 U.S. 452, 470 n.4 (1994) (Souter, J., concurring) (relying on social science to explain behavioral tendencies exhibited by suspects during a police interrogation).

In *Long*, the Utah Supreme Court declared that trial courts must give cautionary jury instructions "whenever eyewitness identification is a central issue in a case and such an instruction is requested by the defense." 721 P.2d at 492. Given the unperceived flaws of eyewitness testimony and the substantial weight given to it by juries, to convict a defendant on eyewitness identification "without advising the jury of the factors that should be considered in evaluating it could well deny the defendant due process of law." *Id.*

And although the Connecticut Supreme Court ruled that it was bound to apply *Biggers*, it held that "some action is necessary to mitigate the risks of [suggestive identification] procedures." *Ledbetter*, 881 A.2d at 316. The court declared that "unless there is no significant risk of misidentification," Connecticut's trial courts must "incorporate an instruction in the charge to the jury, warning the jury of the risk of misidentification" in cases involving a suggestive identification procedure. *Ledbetter*, 881 A.2d at 318.

C. The *Biggers* Factors Do Not Reliably Predict the Accuracy of Eyewitness Identifications

A legion of empirical studies analyzing the *Biggers* factors have concluded not only that certain of these factors may have an inconclusive impact on the overall reliability analysis, but also that these factors may actually be misleading in certain circumstances.[7] The vast majority of

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[7] *See, e.g.*, Amy L. Bradfield & Gary L. Wells, *The Perceived Validity of Eyewitness Identification Testimony: A Test of the Five* Biggers *Criteria*, 24 LAW & HUM. BEHAV. 581 (2000); Gary L. Wells & Amy L. Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED PSYCHOL. 360, 374-75 (1998) [hereinafter *Good, You Identified the Suspect*]; Gary L. Wells and Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL'Y & L. 765, 785 (1995); Wells & Murray, *What Can Psychology Say*, *supra*, at 347. *See generally* BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW (1995) [hereinafter *Mistaken Identification*].

studies have confirmed that little or no correlation exists between a witness's certainty and the accuracy of the identification. This conclusion is especially alarming given that the factor upon which juries place the greatest weight is witness certainty. Cutler & Penrod, *Mistaken Identification*, *supra*, at 181-209. Researchers have also characterized three of the four remaining *Biggers* factors as subjective "self-report" variables measured by the witness, which, contrary to beliefs commonly held by laypersons, do not accurately reflect the actual circumstances at the time of the crime. *See* Judges, *supra*, at 265; Rosenberg, *supra*, at 276-79. As illustrated below, proven limitations on human perception can undermine the utility of an eyewitness's report of the very information upon which the *Biggers* framework relies, severely compromising the effectiveness of the *Biggers* test.

1. Witness's Level of Certainty

Scientific research has undermined the commonly held misconception that the level of certainty (or "confidence") a witness demonstrates in making an identification is a reliable predictor of accuracy. This assumption is wrong; confidence is not an independent indicator of accuracy. *See, e.g.*, Cutler & Penrod, *Mistaken Identification*, *supra*, at 94-96; Bradfield & Wells, *supra*, at 590-92; C. A. Elizabeth Luus & Gary L. Wells, *Eyewitness Identification Confidence*, *in* ADULT EYEWITNESS TESTIMONY 348, 348-61 (David Frank Ross et al. eds. 1994); Kenneth A. Deffenbacher, *Eyewitness Accuracy and Confidence: Can We Infer Anything About Their Relationship?*, 4 LAW & HUM. BEHAV. 243, 258 (1980) ("The judicial system should cease and desist from a reliance on eyewitness confidence as an index of eyewitness accuracy.").

At most, only a weak correlation exists between the level of certainty demonstrated by the witness at the identification and the accuracy of that identification. *See, e.g.*, Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 622-23 (1998) [hereinafter *Eyewitness*

Identification Procedures]; Brian L. Cutler et al., *The Reliability of Eyewitness Identification: The Role of System and Estimator Variables*, 11 LAW & HUM. BEHAV. 233, 236 (1987) ("experiments testing the eyewitness-confidence accuracy relation indicate that the correlation is negligible"). The primary problem with the certainty factor is that witnesses may exhibit confidence entirely independent of the accuracy of their judgments. "The confidence-accuracy relationship is generally found to be small or absent, but witnesses are confident in whatever choice they make." Roy S. Malpass & Patricia G. Devine, *Eyewitness Identification: Lineup Instructions and the Absence of the Offender*, 66 J. APPLIED PSYCHOL. 482, 488 (1981).

Not only is the certainty factor the least reliable *Biggers* factor, but it is also the one most likely to taint the jury's deliberations.[8] *See, e.g.*, Steven Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 PSYCHOL. PUB. POL. & L. 817, 830 (1995) ("Jurors are not adequately sensitive to aspects of witnessing and identification conditions that are arguably better predictors of witness accuracy than is witness confidence"); Luus & Wells, *Eyewitness Identification Confidence*, *supra*, at 348 ("jurors tend to rely heavily on eyewitness confidence to infer witness accuracy"); R. C. L. Lindsay et al., *Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?*, 66 J. APPLIED PSYCHOL. 79, 80-82 (1981) (finding that eyewitness confidence accounted for as much as 50 percent of the variability in mock juror belief in eyewitness testimony).

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[8] The Members of this Court have recognized that "despite its inherent unreliability, much eyewitness identification evidence has a powerful impact on juries." *Watkins*, 449 U.S. at 352 (Brennan, J., dissenting, with Marshall, J.); *see also Brathwaite*, 432 U.S. at 120 (Marshall, J., dissenting) (a "fundamental fact of judicial experience" ignored by the Court is that "juries unfortunately are often unduly receptive to [identification] evidence").

Eyewitness identification evidence will be particularly persuasive to jurors when the witness exhibits confidence in the identification, whether correct or incorrect. *See, e.g.*, Bradfield & Wells, *supra*, at 582 ("researchers have found that certainty of an eyewitness has a strong impact on participant-jurors' perceptions of the accuracy of the identification" (citing studies)); Cutler & Penrod, *Mistaken Identification*, *supra*, at 181-196 (surveys show that people believe a strong relation exists between eyewitness confidence and accuracy). In one study, mock jurors relied heavily on witness confidence but were unable to differentiate between accurate and inaccurate testimony, believing both approximately 80% of the time, "irrespective of the actual rate of witness accuracy." Gary L. Wells et al., *Accuracy, Confidence, and Juror Perception in Eyewitness Identification*, 64 J. APPLIED PSYCHOL. 440, 447 (1979).

By the time a jury assesses a witness's confidence, the level of confidence may be inflated by numerous externalities, such as repeated questioning and coaching stemming from witness preparation. *See* Penrod & Cutler, *Witness Confidence and Witness Accuracy*, *supra*, at 830 ("witness confidence . . . appears to be highly malleable and influenced by postidentification factors such as repeated questioning, briefings in anticipation of cross-examination, and feedback about the behavior of other witnesses."). Based on this inflated confidence, jurors may tend to give eyewitness testimony disproportionate weight in voting to convict a defendant even in the face of evidence discrediting the eyewitness.

2. Witness's Opportunity to View the Criminal at the Time of the Crime

Courts are required under *Biggers* to consider the witness's opportunity to view the criminal during the crime. But the information upon which courts must rely is merely the witness's own approximation of his or her distance from the criminal, the extent to which the criminal's face was

blocked, or most commonly, the amount of time the witness had to view the assailant.

Witnesses are often unable to accurately estimate such information. Most significantly, a witness's ability to approximate the time he or she had to observe the criminal is, poor at best. Witnesses almost invariably overstate temporal duration. Jonakait, *supra*, at 518. Whereas a witness's estimate of distance, speed, height or weight may err in either direction, humans always tend to perceive an event as lasting longer than it actually did. *Id.* The tendency to overstate is even stronger when the witness is experiencing stressful circumstances. Rosenberg, *supra*, at 278-79. The *Biggers* test therefore requires courts to rely on information that has effectively been tainted by the limits of human perception.

3. Witness's Degree of Attention

Consideration of the witness's degree of attention also requires reliance on the witness's own approximation of his or her own attentiveness. That alone is problematic, but this factor's relevancy is further cast into doubt by scientific studies that have debunked the commonly held myth that a witness is more attentive to details in a dangerous situation and thus better able to accurately identify the assailant. Rosenberg, *supra*, at 278. The presence of a weapon can further undermine a witness's ability to observe identifying characteristics of an assailant; this weakened capacity is referred to as the "weapon focus" phenomenon, whereby the presence of a knife or a gun, for example, narrows a witness-victim's concentration. ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 35 (1996 ed.). Rather than focus on the assailant's face or other distinguishing features (*e.g.*, tattoos), the witness will concentrate more intently on the weapon, rendering that witness's ability to identify the assailant less reliable. *Id.* Thus, a witness's estimation of his or her attentiveness to the assailant is unlikely to aid in the analysis of whether an identification is independently reliable.

4. Accuracy of the Prior Description

The "accuracy of the witness's prior description" factor has also been questioned on the basis that it is irrelevant to the accuracy of the identification itself. Scientific evidence indicates that there is no "appreciable relationship between a person's prior description of a face and the person's accuracy in identifying the face." Wells & Murray, *What Can Psychology Say, supra*, at 355 (citing studies); *see also* Alvin G. Goldstein et al., *Does Fluency of Face Description Imply Superior Face Recognition?*, 13 BULL. PSYCHONOMIC SOC'Y 15, 15-18 (1979). Moreover, a witness's verbal ability to describe an individual's face does not correlate to the witness's ability to accurately identify that person. *See* A. Daniel Yarmey, THE PSYCHOLOGY OF EYEWITNESS TESTIMONY 138-39 (1979). Thus, even a description provided before an identification that closely parallels a defendant's features does not necessarily render the identification reliable. Finally, even if the initial description and the defendant's characteristics are identical, witnesses may be led to erroneously recall certain characteristics during the initial description. *See* Wells & Murray, *What Can Psychology Say, supra*, at 355. Under such circumstances, this *Biggers* factor is undeniably satisfied, but both the prior description and the subsequent identification would be inaccurate.

D. The *Biggers* Test Is Not Immune from the Taint of Suggestive Identification Procedures

As demonstrated above, the *Biggers* factors are ineffective predictors of accuracy, even without the taint of an unnecessarily suggestive identification procedure. The *Biggers* test was fashioned to determine whether a tainted identification could be rehabilitated on the basis that it is independently reliable. The *Biggers* factors, however, are not immune from the tainting effects of a suggestive procedure. Social scientists have proven that these factors—especially witness certainty—are vulnerable to such contamination; thus, the *Biggers* analysis is not sufficiently

independent of the threshold issue of suggestiveness. *See, e.g.*, Wells, *Eyewitness Identification Procedures*, *supra*, at 631; Judges, *supra*, at 264-70. *See also Cossel v. Miller*, 229 F.3d 649, 655 n.4 (7th Cir. 2000) ("The fourth *Biggers* factor—the level of certainty demonstrated by the witness at the time of the identification—has little relevance here, where the level of certainty a witness demonstrates is just as likely to be a product of a prior unduly suggestive identification as it is to be a product of an independent recollection of the crime.").

Unlike physical evidence, which is subject to stringent scientific methods of collection, documentation, and preservation, memory evidence is handled in a manner based merely on intuition and tradition. *See* Judges, *supra*, at 240-41. Indeed, the so-called "system" variables within the investigator's control during collection of eyewitness evidence (*e.g.*, line-up and show-up methods, questions asked, and comments made during interviews and identification processes) remain largely unregulated and can have a dramatic impact on eyewitness accuracy when suggestive. *See id.* at 243-45. Because suggestiveness is likely to infect a witness's memory and increase a witness's level of certainty—especially when the suggestiveness originates with highly credible sources such as police officers—eyewitness testimony may become contaminated throughout the investigative process, during interviews, lineups, show-ups and post-identification communication. *Id.* at 245-69.

Experiments designed to test the effect of suggestive post-identification feedback illustrate how the *Biggers* test factors cannot be evaluated independently of the suggestiveness that initially compromised the identification. In one such study, eyewitnesses to simulated crimes were asked to identify the "criminal" out of a photo line-up. Following those identifications, certain participants were told: "Good. You identified the actual suspect"; others were given disconfirming or no feedback. Wells & Bradfield, *Good, You Identified the Suspect*, *supra*, at 363. The

researchers concluded that "a casual comment from a lineup administrator following eyewitnesses' identifications can have dramatic effects on their reconstructions of the witnessing and identification experience" and that "a suggestive procedure itself (the feedback) can cause eyewitnesses to come across strongly" on "four of the five *Biggers* criteria (confidence, view, attention, and description of the perpetrator). . . ." *Id.* at 374-75. Most significantly, researchers found that confirming feedback had a "huge effect" on the witness's level of certainty. *Id.* at 374.

A suggestive identification procedure so fundamentally contaminates the factors used to evaluate independent reliability as to render them useless. Indeed, "arguing that a suggestive procedure is not a problem because of the eyewitness's high standing on the *Biggers* criteria is a bit like arguing that a forensic DNA procedure that contaminated the suspect's blood with the sample at the crime scene is not a problem because the lab results show that the match is virtually perfect." *Id.* at 375.

II. The Overwhelming Majority of Wrongful Convictions Have Been Premised on Erroneous Eyewitness Identifications

A. Exoneration Data Studies Confirm that Eyewitness Misidentification Is the Most Prevalent Cause of Wrongful Convictions

Mistaken eyewitness identification is the most common cause of wrongful convictions; indeed, the Innocence Project has concluded that 125 of the first 163 (76.69%) individuals exonerated by DNA evidence had been convicted, at least in part, by eyewitness misidentification. *See* Innocence Project, http://www.innocenceproject.org/causes/mistakenid.php (last visited on January 29, 2006).

A recent study reviewing 340 exonerations between 1989 and 2003 found that 64% involved at least one mistaken identification. *See* Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J.

CRIM. L. & CRIMINOLOGY 523, 542 (2005). Another study concluded that approximately 90% of the cases analyzed therein involved one or more mistaken identifications. Wells, *Eyewitness Identification Procedures*, *supra*, at 605-08. Likewise, the U.S. Department of Justice study reviewed twenty-eight DNA exoneration cases and found that, in a majority of the cases, eyewitness identifications had provided compelling (but erroneous) evidence at trial. *See* U.S. DEP'T OF JUSTICE, NAT'L INSTITUTE OF JUSTICE, *Convicted By Juries, Exonerated By Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, Pub. No. NCJ 161258, 24 (1996), *available at* http://www.ncjrs.org/pdffiles/dnaevid.pdf.

B. The Need for Revision Is Underscored by the Stories of Innocent Individuals Wrongly Convicted under *Biggers*

The infirmities of the *Biggers* framework are exemplified by those innocent men and women who have been or remain unjustly imprisoned because an eyewitness's identification was erroneously deemed "reliable" under *Biggers*. The stories of Carlos Lavernia, Mark Reid, and Steven Toney illustrate the tragic results that can follow an erroneous *Biggers* analysis.[9]

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[9] The three men profiled here are but a small sample of exonerees whose wrongful convictions were based on mistaken eyewitness identifications. Others include: Clark McMillan (*McMillan v. Barksdale*, 823 F.2d 981 (6th Cir. 1987)); Ronnie Bullock (*People v. Bullock*, 507 N.E.2d 44 (Ill. App. Ct. 1987)); Clyde Charles (*State v. Charles*, 511 So. 2d 1164 (La. Ct. App. 1987)); Bernard Webster (*Webster v. State*, 474 A.2d 1305 (Md. Ct. App. 1984)); David Brian Sutherlin (*State v. Sutherlin*, 393 N.W.2d 394 (Minn. Ct. App. 1986)); Jimmy Ray Bromgard (*State v. Bromgard*, 862 P.2d 1140 (Mont. 1993)); Chester Bauer (*State v. Bauer*, 683 P.2d 946 (Mont. 1984)); Lesly Jean (*State v. Jean*, 311 S.E.2d 266 (N.C. 1984)); Terry Chalmers (*People v. Chalmers*, 163 A.D.2d 528 (N.Y. App. Div. 1990)); Leonard Callace (*People v. Callace*, 143 A.D.2d 1027 (N.Y. App. Div. 1988)); Wahir Abdal Abdal, a.k.a. Vincent Jenkins (*People v. Jenkins*, 132 A.D.2d 942 (N.Y. App.

1. Carlos Lavernia, Served Fifteen Years

In 1985, Carlos Lavernia was convicted of aggravated rape, principally on the basis of the victim's eyewitness testimony. *Lavernia v. Lynaugh*, 845 F.2d 493, 495 (5th Cir. 1988). Unable to make a positive identification during two photographic lineups, the victim subsequently identified Lavernia as her assailant in a third photo lineup, fourteen months after the crime. *Id.* The Fifth Circuit affirmed the denial of Lavernia's *habeas corpus* petition, determining that the identification was reliable under *Biggers*. *Id.* at 500. The court found that even though such a significant period of time had passed between the crime and the identification, "the victim could hardly have expressed more certainty with regard to her identification[,]" she had "ample opportunity to view Lavernia[,] [and] . . . the description she gave the police of the assailant accurately fit Lavernia." *Id.* at 500. Lavernia was sentenced to ninety-nine years in prison, fifteen of which he served until he was successfully exonerated by DNA evidence. *See* Innocence Project Case Profiles, http://www.innocenceproject.org/case/display_profile.php?id=79 (last visited on January 29, 2006).

2. Mark Reid, Served Six Years

Following a jury trial, Mark Reid was convicted of sexual assault and kidnapping in the first degree, based in part on the victim's identification of him as the assailant. *State v. Reid*, 757 A.2d 482, 484, 489-91 (Conn. 2000). The victim described her attacker to police on the night of the attack as a stocky, light-skinned black male, about 5'7", with

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Div. 1987)); Brian Piszczek (*State v. Piszczek*, No. CR-257813, 1993 WL 106966 (Ohio Ct. App. April 8, 1993)); Walter D. Smith (*State v. Smith*, No. 87AP-85, 1988 WL 79080 (Ohio Ct. App. July 28, 1988)); Danny Brown (*State v. Brown*, C.A. No. L-92-297, 1983 WL 6945 (Ohio Ct. App. Sept. 16, 1983)); Thomas Webb (*Webb v. State*, 746 P.2d 203 (Okla. Crim. App. 1987)); Nicholas Yarris (*Commonwealth v. Yarris*, 549 A.2d 513 (Pa. 1988)); Glen Woodall (*State v. Woodall*, 385 S.E.2d 253 (W. Va. 1989)). *See also* Innocence Project Case Profiles, *available at* http://www.innocenceproject.org/case/search_profiles.php.

freckles across his nose and under his eyes. *Id.* at 485; Innocence Project Case Profiles, *available at* http://www.innocenceproject.org/case/display_profile.php?id=133 (last visited on January 29, 2006). Nevertheless, while she was shaking and crying, she selected Reid out of a photographic lineup conducted just four days later, despite the fact that Reid is 6′0″ and the photo contained no visible freckles. *See Reid*, 757 A.2d at 485, 492. Because she later testified that she had ample time to view him during the crime and that she had no doubt that Reid was her attacker—indeed, the court reiterated the victim's statement that her attacker's face was "a face I would not forget"—the court determined that the identification was reliable under *Biggers*. 757 A.2d at 492-93. Both the victim and the court were wrong. DNA test results conclusively established Reid's innocence; he was exonerated after serving six years.

3. Steven Toney, Served Thirteen Years

Steven Toney was convicted of rape and sodomy and was sentenced to two consecutive life terms, largely on the basis of eyewitness testimony. *State v. Toney*, 680 S.W.2d 268, 271 (Mo. Ct. App. 1984). Engaging in a *Biggers* analysis, the court concluded that the victim's testimony was reliable because (1) she had a good opportunity to observe the appellant's face at least twice without distraction; (2) "[t]he level of certainty of each of the identifications was high"; and (3) only eight days had passed between the attack and the photo lineup. *Id.* at 276. Despite discrepancies between the victim's original description and Toney's physical characteristics, the court stated that these discrepancies were "unrelated to" the claims of suggestiveness. *Id.* Before he was cleared of all charges by DNA evidence, Toney served over thirteen years in prison. *See* Innocence Project Case Profiles, http://www.innocenceproject.org/case/display_profile.php?id=09 (last visited on January 29, 2006).

CONCLUSION

The empirical evidence establishing the fallibility of eyewitness testimony and the *Biggers* test, which was not expressly grounded in scientific research, is essentially unchallenged. The growing number of exonerated criminal defendants wrongfully convicted based on erroneous eyewitness identifications further confirms that the *Biggers* test fails to accomplish its purpose—namely, to ensure that only reliable eyewitness identifications are considered. Accordingly, this Court should now reconsider the *Biggers* test and harmonize it with current scientific knowledge in order to preserve the due process rights of innocent men and women across the Nation.

Several conceivable alternatives exist to remedy the infirmities of *Biggers*, such as: (1) removing the certainty factor, as well as the other factors that have been undermined by sociological and scientific research, from the current analytical framework; (2) suppressing eyewitness identifications obtained from unnecessarily suggestive identification procedures; (3) requiring courts to issue cautionary jury instructions; and/or (4) encouraging expert testimony on eyewitness identification. As the *Biggers* test currently stands, however, courts are bound to follow a flawed analytical framework that is not based upon, and is contrary to, established empirical findings.

For the foregoing reasons, and for the reasons stated in the Petitioner's brief, the petition for a writ of certiorari should be granted.

Respectfully submitted.

JULIAN W. POON
Counsel of Record
ROD J. STONE
DANIEL M. FLORES
ARIANE J. SIMS
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
(213) 229-7000

Counsel for Amicus Curiae
The Innocence Network

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JOSE ANTONIO PEREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pamela Harris
Co-Chair, Amicus Committee
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1625 Eye Street, N.W., 10th Fl.
Washington, DC 20006
(202) 383-5386

John C. O'Quinn
Counsel of Record
Erin E. Morrow
KIRKLAND & ELLIS LLP
655 15th Street, N.W.
Washington, DC 20005
(202) 879-5000

Counsel for Amicus Curiae NACDL

January 30, 2006

QUESTION PRESENTED

Neil v. Biggers, 409 U.S. 188 (1972), requires courts to consider the level of an eyewitness's certainty in determining whether an identification made during an unnecessarily suggestive procedure is nonetheless sufficiently reliable to satisfy the requirements of due process. The question presented is whether this Court should reconsider *Biggers*' eyewitness-certainty factor in light of subsequent empirical evidence demonstrating that witness certainty has no bearing on the accuracy of an identification—empirical evidence that has led many federal courts to question and state courts to reject application of that factor in assessing reliability.

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from all 50 States. NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving the reliability of eyewitness identifications.

NACDL is particularly interested in seeing the correct rule emerge from this case, because of the scientific consensus that witness confidence has little to do with reliability and because misidentifications continue to be the leading cause of wrongful convictions.[1]

STATEMENT OF THE CASE

Over thirty years ago this Court recognized that the "annals of criminal law are rife with instances of mistaken identification." *United States v. Wade*, 388 U.S.

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[1] The parties have consented to the filing of this brief in letters that are on file in the Clerk's office. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored any part of this brief, and no person or entity other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

218, 228 (1967) (citing empirical research). Over the ensuing thirty-nine years, little has changed. Indeed, eyewitness misidentification is now the single greatest source of wrongful convictions in the United States. *See* Gary L. Wells, et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 L. & HUM. BEHAV. 603, 606 (1998).

This problem is not well addressed by the standard crafted by this Court to ensure the reliability of eyewitness identifications—a standard that has itself proven unreliable. In *Neil v. Biggers*, 409 U.S. 188, 199 (1972), this Court held that an eye-witness identification that is the product of an otherwise *unconstitutionally suggestive identification procedure* nonetheless may be admitted if there are certain indicia of reliability. One of the key factors allowing admission, the Court held, is the witness's certainty that his or her identification is accurate.

That factor has failed the test of time. Since *Biggers* was decided, empirical research consistently has shown that the certainty or confidence of a witness bears little, if any, relation to the reliability of an identification. Indeed, the lack of any strong correlation between witness certainty and accuracy is at this point beyond all reasonable dispute. Thus, on a daily basis, courts admit what are otherwise unconstitutionally suggestive identifications based solely on a factor that makes no empirical sense. Worse yet, some trial courts are extending the *Biggers* framework to preclude unquestionably qualified experts from testifying about an admittedly scientific fact: that eyewitness confidence has nothing to do with accuracy. *See e.g., United States v. Lumpkin*, 192 F.3d 280, 289 (2d Cir. 1999). This Court should grant *certiorari* to reconsider the five-factor totality of the circumstances test devised by *Neil v. Biggers* for three reasons.

First, the fact that lower courts have called into question or outright rejected reliance on witness certainty demonstrates that the time is ripe to revisit *Biggers*. State courts of last resort applying state constitutional provisions are free to reject the witness-certainty factor, and many have done so. Moreover, although federal courts continue to be bound by this Court's holding in *Biggers*—thus precluding a direct circuit split—their express dissatisfaction with the *Biggers* test has led to a number of closely related disagreements. For example, the circuits are hotly divided over whether and to what extent expert testimony to contradict eyewitness confidence is admissible.

Second, the *Biggers'* witness-confidence prong is a prime candidate for review and revision under principles of *stare decisis*. The empirical basis of this aspect of *Biggers* has eroded to the vanishing point; the witness-confidence prong is only superficially workable; reliance interests are not at stake; and, because *Biggers* is a constitutional decision, it is not subject to legislative correction.

Third, the erroneous witness-certainty factor is applied in courts across the country every day and has been shown to result in wrongful convictions. That alone warrants this Court's consideration. Little this Court does is more important than protecting the due process rights of defendants whose liberty and life are at stake and ensuring public confidence in the criminal trial process.

REASONS FOR GRANTING THE WRIT

I. THE LOWER COURTS HAVE CALLED INTO QUESTION THE VALIDITY OF *BIGGERS'* WITNESS-CERTAINTY FACTOR AND DIVIDED OVER ITS APPLICATION.

In the decades since *Biggers* was decided, scientific evidence has demonstrated beyond reasonable dispute